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4 ROBERT GOODWIN ANDERSON,  
5 Plaintiff,  
6 -vs-  
7 CAROLYN W. COLVIN,  
8 Acting Commissioner of Social Security,  
9 Defendant.  
10  
11

No. 2:14-CV-0112-WFN

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

12 Before the Court are cross-Motions for Summary Judgment (ECF Nos. 13 and 14).  
13 Attorney Dana C. Madsen represents Plaintiff; Special Assistant United States Attorney  
14 Jeffrey E. Staples represents Defendant. The Court has reviewed the administrative record  
15 and briefs filed by the parties and is fully informed.

#### JURISDICTION

16 Plaintiff protectively applied for supplemental security income benefits on July 18,  
17 2012, alleging disability beginning on January 1, 2005,<sup>1</sup> due to physical and mental  
18 impairments. The application was denied initially and on reconsideration.<sup>2</sup>

19 A hearing was held before Administrative Law Judge (ALJ) James Sherry on April  
20 24, 2013. At the hearing, Plaintiff, represented by counsel, testified as did K. Diana  
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23 <sup>1</sup>At the hearing, Plaintiff's counsel and the ALJ agreed that, for purposes of this  
24 case, the disability onset date was the date of Plaintiff's application—July 18, 2012. (Tr. at  
25 66.)

26 <sup>2</sup>Plaintiff filed an earlier application dated January 13, 2011 that was adjudicated  
27 and denied on November 1, 2011. Therefore, the time period relevant to this case begins  
28 November 1, 2011.

1 Kramer, a vocational expert (VE). The ALJ concluded that Plaintiff was not disabled.  
 2 The Appeals Council denied Plaintiff's request for review making the ALJ's decision the  
 3 final decision of the Commissioner. Pursuant to 42 U.S.C. § 405(g), this final decision is  
 4 appealable to the district court. Plaintiff sought judicial review on April 22, 2014.

## 5 FACTS

6 The facts of the case are set forth in detail in the transcript of the proceedings and  
 7 are briefly summarized here.

8 At the time of the hearing, Plaintiff was 41 years old and lived at the Union Gospel  
 9 Mission [UGM]. (Tr. at 64.) Plaintiff did not complete school past the ninth grade and  
 10 never obtained a GED. (Tr. at 36.)

11 Plaintiff suffers from multiple sclerosis [MS], headaches, back issues, poor eyesight,  
 12 sensitivity to light, weak legs, difficulty balancing, fatigue, and poor concentration. (Tr. at  
 13 73-79.) Plaintiff's impairments require him to lie down 2-3 times a day for approximately  
 14 30 minutes at a time. (Tr. at 74.)

15 Despite his impairments, Plaintiff can walk 50-100 yards with the assistance of a  
 16 cane, climb a flight of stairs, lift 10-20 pounds with some difficulty, sit for 15-20 minutes  
 17 at a time, and perform light chores at UGM for a couple hours a day. (Tr. at 69-79.)

## 18 SEQUENTIAL PROCESS

19 The Commissioner has established a five-step sequential evaluation process for  
 20 determining whether a person is disabled. 20 C.F.R. § 416.920(a); *see Bowen v. Yuckert*,  
 21 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of proof rests upon the  
 22 claimant to establish a *prima facie* case of entitlement to disability benefits. *Tackett v.*  
 23 *Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999). This burden is met once a claimant  
 24 establishes that a physical or mental impairment prevents him from engaging in his  
 25 previous occupation. 20 C.F.R. § 416.920(a)(4). If a claimant cannot do his past relevant  
 26 work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show  
 27 that (1) the claimant can make an adjustment to other work; and (2) specific jobs exist in  
 28 the national economy which claimant can perform. *Batson v. Comm'r, Soc. Sec. Admin.*,

1 359 F.3d 1190, 1193-94 (9th 2004). If a claimant cannot make an adjustment to other  
 2 work in the national economy, a finding of "disabled" is made. 20 C.F.R. §  
 3 416.920(a)(4)(i-v).

#### 4 **ADMINISTRATIVE DECISION**

5 At step one, the ALJ determined that Plaintiff did not engage in substantial gainful  
 6 activity since July 18, 2012, the application date.

7 At step two, the ALJ found that Plaintiff had the following severe impairments: mild  
 8 discogenic spondylosis of the cervical spine at C5-6 and lumbar spine at L5-S1; mild  
 9 cervical dextroconvex scoliosis; chronic obstructive pulmonary disease/asthma; MS;  
 10 alcohol and polysubstance dependence; adjustment disorder with mixed anxiety and  
 11 depressed mood; personality disorder.

12 At step three, the ALJ found that Plaintiff did not have an impairment or  
 13 combination of impairments that met or medically equaled any of the listed impairments  
 14 described at 20 C.F.R. Part 404, Subpart P, Appendix 1(20 C.F.R. §§ 416.920(d), 416.925,  
 15 and 416.926).

16 At step four, the ALJ found that Plaintiff had the residual functional capacity [RFC]  
 17 to perform medium work subject to certain exertional, social, and environmental  
 18 limitations. The ALJ concluded that Plaintiff could perform past relevant work as a hand  
 19 packager and salvager.

20 Because the ALJ found Plaintiff capable of performing past relevant work, the ALJ  
 21 did not reach step five.

#### 22 **STANDARD OF REVIEW**

23 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the court set out the  
 24 standard of review:

25 A district court's order upholding the Commissioner's denial of benefits is  
 26 reviewed *de novo*. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000).  
 27 The decision of the Commissioner may be reversed only if it is not supported  
 28 by substantial evidence or if it is based on legal error. [*Tackett*, 180 F.3d at  
 1097]. Substantial evidence is defined as being more than a mere scintilla, but

1 less than a preponderance. *Id.* at 1098. Put another way, substantial evidence  
 2 is such relevant evidence as a reasonable mind might accept as adequate to  
 3 support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the  
 4 evidence is susceptible to more than one rational interpretation, the court may  
 5 not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at  
 6 1097; *Morgan v. Commissioner of Social Sec. Admin.* 169 F.3d 595, 599 (9th  
 7 Cir. 1999).

8 The ALJ is responsible for determining credibility, resolving conflicts in medical  
 9 testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*,  
 10 although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

11 It is the role of the trier of fact, not this court, to resolve conflicts in evidence.  
 12 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation,  
 13 the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180  
 14 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a decision  
 15 supported by substantial evidence will still be set aside if the ALJ did not apply the  
 16 proper legal standards in weighing the evidence and making the decision. *Brawner v.*  
 17 *Secretary of Health and Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial  
 18 evidence exists to support the administrative findings, or if conflicting evidence exists that  
 19 will support a finding of either disability or non-disability, the Commissioner's  
 20 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.  
 21 1987).

## 22 ISSUES

23 1. Did the ALJ err in evaluating the medical evidence of Plaintiff's mental and  
 24 physical impairments?

25 2. Did the ALJ err in finding Plaintiff not credible and rejecting Plaintiff's  
 26 subjective complaints?

## 27 DISCUSSION

28 1. **Did the ALJ err in evaluating the medical evidence of Plaintiff's mental and  
 29 physical impairments?**

ORDER GRANTING PLAINTIFF'S  
 MOTION FOR SUMMARY JUDGMENT- 4

1 Plaintiff argues that the ALJ erred by assigning greater weight to the opinions of  
 2 nonexamining physicians Drs. Rubin and Eather and by not providing adequate reasons for  
 3 rejecting the opinions of treating physician Dr. Wurst and examining physicians Drs.  
 4 Greene and Arnold.

5 In weighing medical source opinions, the ALJ should distinguish between three  
 6 different types of doctors: (1) treating doctors, who actually treat the claimant;  
 7 (2) examining doctors, who examine but do not treat the claimant; and (3) nonexamining  
 8 doctors who neither treat nor examine the claimant. *Lester*, 81 F.3d at 830. The ALJ  
 9 should give more weight to the opinion of a treating doctor than to the opinion of an  
 10 examining doctor. *Orn*, 495 F.3d at 631. The ALJ should give more weight to the opinion  
 11 of an examining doctor than to the opinion of a nonexamining doctor. *Id.*

12 When a doctor's opinion is not contradicted by another doctor, the ALJ may reject  
 13 the opinion only for "clear and convincing" reasons. *Baxter v. Sullivan*, 923 F.2d 1391,  
 14 1396 (9th Cir. 1991) (quoting *Davis v. Heckler*, 868 F.2d 323, 326 (9th Cir. 1989)). When  
 15 a doctor's opinion is contradicted by another doctor, the ALJ is only required to provide  
 16 "specific and legitimate reasons" for rejecting the opinion of the first doctor. *Murray v.*  
 17 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983).

18 In this case, there is conflicting medical evidence regarding whether Plaintiff is  
 19 disabled. Compare Tr. at 699 (Dr. Wurst opining that Plaintiff is "unable to perform work  
 20 of any kind") with Tr. at 140 (Dr. Eather opining that Plaintiff is "capable of completing a  
 21 40 hour work week"). Therefore, the ALJ was only required to provide "specific and  
 22 legitimate reasons" for rejecting the opinions finding Plaintiff disabled.

23           **a. John Wurst, M.D.**

24 Plaintiff started seeing Dr. Wurst for treatment of his MS beginning September 21,  
 25 2010. (Tr. at 697.) Plaintiff continued to see Dr. Wurst about every one or two months  
 26 through at least September 2012. (Tr. at 696.) Over this time period, Dr. Wurst  
 27 consistently diagnosed Plaintiff with relapsing remitting MS. Dr. Wurst documented  
 28 Plaintiff's complaints and appearance, monitored his level of pain, and made adjustments

1 to his medications. It does not appear that Dr. Wurst ever assessed Plaintiff's mental or  
2 physical limitations or otherwise evaluated how Plaintiff's MS affected his daily activities  
3 or ability to work. In a letter dated January 13, 2012, Dr. Wurst summarily opined that,  
4 because of Plaintiff's MS, Plaintiff is disabled and "unable to perform work of any kind."  
5 (Tr. at 259; 699.)

6 The ALJ gave little weight to Dr. Wurst's opinions reasoning that Dr. Wurst's  
7 opinions were not supported by his own findings, which revealed mild limitations. (Tr.  
8 at 20.) The ALJ also reasoned that Dr. Wurst's opinions were based on Plaintiff's non-  
9 credible self-reporting and that Plaintiff did not put forth maximum effort during muscle  
10 testing. (Tr. at 20.)

11 Based on the record before him, the ALJ gave sufficient reasons for assigning little  
12 weight to Dr. Wurst's opinions. *See Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir.  
13 2005) (finding that an ALJ may cite internal inconsistencies in evaluating a physician's  
14 report); *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (doctor's opinion may  
15 be discounted if it relies on a claimant's unreliable self-report).

16 Nevertheless, the Court finds that the ALJ erred in discounting Dr. Wurst's opinions  
17 without fully developing the record. "In Social Security cases the ALJ has a special duty  
18 to fully and fairly develop the record and to assure that the claimant's interests are  
19 considered." *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996). An ALJ fails to  
20 provide clear and convincing reasons for rejecting a physician's opinion when the ALJ  
21 does not know the basis of the opinion. *Id.* Dr. Wurst, a neurologist, has been Plaintiff's  
22 treating physician for several years and apparently is the only physician whom Plaintiff  
23 has regularly seen for his MS. The Court agrees with the ALJ that Dr. Wurst's January 13,  
24 2012 letter is conclusory. But rather than completely discounting Dr. Wurst's opinion, the  
25 ALJ should have developed the record to determine the basis of Dr. Wurst's opinions. *See*  
26 *id.*; *see also Hankerson v. Harris*, 636 F.2d 893, 896 (2d Cir. 1980) ("Before the ALJ can  
27 reject an opinion of a . . . claimant's treating physician because it is conclusory, basic  
28 principles of fairness require that [the ALJ] . . . give [the claimant] an opportunity to

1 obtain a more detailed statement."). On remand, the ALJ should conduct an appropriate  
 2 inquiry into Dr. Wurst's opinions by means of subpoena, by submitting further questions to  
 3 Dr. Wurst, allowing Plaintiff to obtain a more detailed opinion, or other methods.

4 The ALJ should also be mindful of the fact that multiple sclerosis is a progressively  
 5 disabling condition characterized by periods of remission and exacerbation. *Estes v. R.R.*  
*Ret. Bd.*, 776 F.2d 1436, 1437 (9th Cir. 1985). The Ninth Circuit has recognized that  
 6 "multiple sclerosis can be disabling notwithstanding normal activity in periods of  
 7 remission." *Id.* at 1438. In evaluating a claimant with MS, the ALJ must consider "the  
 8 frequency and duration of the exacerbations, the length of the remissions, and the evidence  
 9 of any permanent disabilities." *Wilcox v. Sullivan*, 917 F.2d 272, 277 (6th Cir. 1990); *see also*  
 10 20 C.F.R. Ch. III, Pt. 404, Subpt. P, App. 1, § 11.00(D) ("In conditions which are  
 11 episodic in character, such as multiple sclerosis ... consideration should be given to  
 12 frequency and duration of exacerbations, length of remissions, and permanent residuals.").  
 13 On remand, the ALJ should develop the record, through further inquiry into Dr. Wurst's  
 14 opinions or otherwise, as to "the frequency and duration of the [Plaintiff's MS related]  
 15 exacerbations, the length of the remissions, and the evidence of any permanent  
 16 disabilities." *Wilcox*, 917 F.2d at 277.

17 **b. William Greene, Ph.D.**

18 Dr. Greene completed psychological evaluations of Plaintiff on March 16, June 8,  
 19 and December 7, 2010. These reports have limited relevance because they were all made  
 20 before the time period relevant to this case—November 1, 2011. *See Carmickle v.*  
*Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1165 (9th Cir. 2008) ("Medical opinions that  
 21 predate the alleged onset of disability are of limited relevance."). Plaintiff argues that  
 22 the ALJ failed to consider these evaluations in issuing his unfavorable decision on  
 23 November 1, 2011. ECF No. 13 at 4 n.4. But a review of the ALJ's earlier decision shows  
 24 that the ALJ did in fact consider Dr. Greene's evaluations. *See* Tr. at 101 ("Little weight is  
 25 given to the . . . evaluations completed by William Greene on . . . [March 16, June 8, and  
 26 December 7, 2010].") Because these opinions predate the period relevant to this case, and

1 because the ALJ considered them in his previous opinion, the ALJ was not required to  
2 revisit them.

3 Despite addressing Dr. Greene's opinions in his earlier decision, the ALJ addressed  
4 them again in the unfavorable decision that is presently before the Court. The ALJ  
5 gave little or no weight to Dr. Greene's opinions because they were based on Plaintiff's  
6 non-credible self-reporting and not supported by objective mental findings. (Tr.  
7 at 21.) The ALJ also reasoned that Plaintiff's ability to keep appointments and  
8 perform chores indicated that his focus and concentration were not disabling. (Tr.  
9 at 22.)

10 Even if Dr. Greene's opinions were fully credited, they would do not establish  
11 Plaintiff's disability. In the March 16, 2010 evaluation, Dr. Greene noted Plaintiff's  
12 alcohol and substance abuse history, and mild and moderate levels of depression and  
13 anxiety. (Tr. at 736.) Dr. Greene concluded, with the help of continuing counseling,  
14 Plaintiff would "be able to return to work full-time." (Tr. at 740.) In the June 8,  
15 2010 evaluation, Dr. Greene noted increased severity of Plaintiff's depression and  
16 anxiety, which he attributed largely to Plaintiff's recent diagnosis of MS. Dr. Greene  
17 concluded, however, that over the course of 6 months, Plaintiff would likely be capable  
18 of transitioning to work he could do, even with MS. (Tr. at 753.) In the December 7,  
19 2010 evaluation, Dr. Greene observed Plaintiff's depression and anxiety increase, rising  
20 to the "marked" level of severity, and noted physical problems relating to Plaintiff's MS.  
21 Dr. Greene noted that the "MS symptoms flare and then go into remission." (Tr.  
22 at 762.) Dr. Greene did not offer a conclusive determination on Plaintiff's ability to  
23 work, noting the recentness of Plaintiff's MS diagnosis and course of medication. (Tr.  
24 at 764.)

25 On remand, the ALJ need not re-address Dr. Greene's opinions because they are  
26 outside the time period relevant to this case, the ALJ considered them in a previous  
27 determination (that Plaintiff did not appeal), and they would not establish Plaintiff's  
28 disability.

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT- 8

1                   **c. John Arnold, Ph.D.**

2                   Dr. Arnold completed a psychological evaluation of Plaintiff on November 2, 2011.  
3 Dr. Arnold diagnosed Plaintiff with major depressive disorder, anxiety disorder, alcohol  
4 dependence sustained partial remission. (Tr. at 773.) Regarding Plaintiff's ability to work,  
5 Dr. Arnold noted that Plaintiff's symptoms would affect "regular attendance,  
6 concentration, productivity, and social interactions." (Tr. at 774.) But Dr. Arnold did not  
7 rule out the possibility that Plaintiff was capable of some types of work. Dr. Arnold  
8 concluded that Plaintiff could understand and carry out simple instructions, complete  
9 simple tasks without close supervision without disrupting others, recognize hazards and  
10 take appropriate precautions, and use the bus for transportation. (Tr. at 774.) Dr. Arnold  
11 also noted that Plaintiff could only concentrate for short periods of time and would work  
12 best in positions that have minimal interaction with others. (Tr. at 774.) Dr. Arnold  
13 recommended continued counseling and appropriate medication management. (Tr. at  
14 774.) Regarding Plaintiff's test results, Dr. Arnold noted that Plaintiff likely over reported  
15 his symptoms, thus requiring the test results to be interpreted with caution. (Tr. at 776.)

16                  The ALJ gave little weight to Dr. Arnold's opinions. The ALJ observed that Dr.  
17 Arnold was unaware of Plaintiff's ongoing alcohol dependence and that Plaintiff's test  
18 results were consistent for over-reporting or exaggeration of symptoms. (Tr. at 22-23.)

19                  On remand, development of the record may require reconsideration of Dr. Arnold's  
20 opinions.

21                   **d. Diane Rubin, M.D. and Bruce Eather, Ph.D.**

22                  Drs. Rubin and Eather reviewed Plaintiff's medical record for a state-level  
23 determination of disability on October 22, 2012. Dr. Rubin noted Plaintiff's diagnoses of  
24 MS, back disorders, asthma, alcohol and substance addiction disorders, and affective  
25 disorders. (Tr. at 135.) Dr. Rubin gave significant weight to the opinions of Dr. Wurst  
26 and the records from Sacred Heart Hospital. (Tr. at 136-37.) Dr. Rubin rated Plaintiff's  
27 exertional limitations finding few physical limitations. (Tr. at 137-39.) Dr. Eather  
28 completed a mental RFC and rated Plaintiff's mental limitations as mostly moderate or not

1 significant. (Tr. at 139-40.) Dr. Eather opined that Plaintiff was "[c]apable of non[-]  
 2 complex and multi[-]step routine tasks, concentration and pace may wane due to  
 3 [symptoms] . . . capable of completing a 40 hour work week." (Tr. at 140.)

4 The ALJ gave significant weight to Dr. Rubin's and Dr. Eather's opinions reasoning  
 5 that they were well supported by the objective medical evidence. (Tr. at 21.)

6 The Court concluded *supra* that the ALJ must augment the record regarding Dr.  
 7 Wurst's opinions and Plaintiff's physical and mental limitations caused by his MS. As Dr.  
 8 Rubin and Dr. Eather both rely, in part, on Dr. Wurst's opinions, the ALJ may need to  
 9 further analyze the opinions of Drs. Rubin and Eather depending on the development of  
 10 the record on remand. And, as the ALJ is no doubt well aware, he must give greater  
 11 weight to the opinions of treating doctors than to the opinion of examining doctors and  
 12 more weight to the opinions of examining doctors than to the opinions of nonexamining  
 13 doctors. *Orn*, 495 F.3d at 631.

14 **e. Jerry Gardner, Ph.D.**

15 Dr. Gardner completed a review of Plaintiff's medical record for a state-level  
 16 determination of disability on August 29, 2012. Dr. Gardner noted Plaintiff's diagnoses of  
 17 MS, back disorders, asthma, alcohol and substance addiction disorders, and affective  
 18 disorders. (Tr. at 121.) Dr. Gardner gave significant weight to the opinions of Dr. Wurst  
 19 and the records from Sacred Heart Hospital. (Tr. at 123.) Dr. Gardner rated Plaintiff's  
 20 exertional, mental, and social limitations and ultimately concluded that Plaintiff was not  
 21 disabled. (Tr. at 123-27.)

22 The ALJ gave great weight to Dr. Gardner's opinions because they were internally  
 23 consistent and consistent with the objective medical evidence.

24 The Court concluded *supra* that the ALJ must augment the record regarding  
 25 Dr. Wurst's opinions and Plaintiff's physical and mental limitations caused by his  
 26 MS. As Dr. Gardner relies, in part, on Dr. Wurst's opinions, the ALJ may need to  
 27 further analyze Dr. Gardner's opinion depending on the development of the record on  
 28 remand.

1           **2. Did the ALJ err in finding Plaintiff not credible and rejecting Plaintiff's  
2 subjective complaints?**

3           The ALJ found Plaintiff's reporting of his symptoms not entirely credible. In  
4 reaching this conclusion, the ALJ primarily reasoned that Plaintiff's reporting of symptoms  
5 was inconsistent with the objective medical evidence and Plaintiff's activities of daily  
6 living. (Tr. at 18, 24.) Throughout the opinion, the ALJ also noted other factors that  
7 influenced his credibility decision including the fact that Plaintiff (1) did not require  
8 hospitalization, Tr. at 18 and 21; (2) did not undergo more than conservative treatment  
9 with pain medication, Tr. at 18-19; and (3) engaged in drug seeking behavior, Tr. at 19.

10          It is generally the province of the ALJ to make credibility determinations. *Andrews*,  
11 53 F.3d at 1039. "To determine whether the claimant's testimony regarding the severity of  
12 [his] symptoms is credible, the ALJ may consider, for example: (1) ordinary techniques of  
13 credibility evaluation, such as the claimant's reputation for lying, prior inconsistent  
14 statements concerning the symptoms, and other testimony by the claimant that appears less  
15 than candid; (2) unexplained or inadequately explained failure to seek treatment or to  
16 follow a prescribed course of treatment; and, (3) the claimant's daily activities." *Smolen*,  
17 80 F.3d at 1284. Absent affirmative evidence showing that the claimant is malingering,  
18 the ALJ must provide "specific, clear and convincing" reasons for rejecting the claimant's  
19 testimony about the severity of the symptoms. *Molina v. Astrue*, 674 F.3d 1104, 1122  
20 (9th Cir. 2012).

21          The Court held *supra* that the ALJ must further develop the record regarding Dr.  
22 Wurst's opinions. If development of the record reveals an objective basis for Dr. Wurst's  
23 opinion that Plaintiff is completely disabled and unable to work, then the ALJ will need to  
24 reassess Plaintiff's credibility. The ALJ should also re-evaluate Plaintiff's credibility in  
25 light of the fact that MS often follows "periods of remission and exacerbation." *Estes*, 776  
26 F.2d at 1437. As the ALJ will likely need to re-evaluate Plaintiff's credibility upon further  
27 development of the record, the Court need not address Plaintiff's specific assignments of  
28 error related to the ALJ's credibility determination.

## **ISSUES ON REMAND**

Remanding for further proceedings is appropriate in this case because the record is not sufficiently developed and it is not clear from the record that the ALJ would be required to find Plaintiff disabled upon augmentation of the record. *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004). On remand, the ALJ should:

1. Conduct an appropriate inquiry into Dr. Wurst's opinion that Plaintiff is unable to work because of his MS. The ALJ may make this inquiry by means of subpoena, by submitting further questions to Dr. Wurst, allowing Plaintiff to obtain a more detailed opinion from Dr. Wurst, or other methods.
  2. Consider that multiple sclerosis is a progressively disabling condition characterized by periods of remission and exacerbation. The ALJ shall develop the record, through further inquiry into Dr. Wurst's opinions or otherwise, as to the frequency and duration of the Plaintiff's MS related exacerbations, the length of the remissions, and the evidence of any permanent disabilities.
  3. If necessary, reconsider the other medical evidence, including the opinions of Drs. Gardner, Arnold, Rubin and Eather, which relied on Dr. Wurst's opinions to some extent.
  4. Reassess Plaintiff's credibility if development of the record reveals an objective basis for Dr. Wurst's opinion that Plaintiff is completely disabled and unable to work.
  5. If necessary, analyze how Plaintiff's past and/or current alcohol use may contribute to his MS or other impairments. If the ALJ finds Plaintiff disabled on remand, the ALJ should also determine whether Plaintiff's DAA is a contributing factor material to his disability.

## CONCLUSION

Having reviewed the record and the ALJ's findings, the Court concludes that there are unresolved issues, the record does not clearly require a finding of disability, and further development of the record is required. Accordingly,

**IT IS ORDERED** that:

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT- 12**

1       1. Plaintiff's Motion for Summary Judgment, filed October 27, 2014, **ECF No. 13**,  
2 is **GRANTED**.

3       2. Defendant's Motion for Summary Judgment, filed December 8, 2014, **ECF**  
4 **No. 14**, is **DENIED**.

5       3. This matter is **REMANDED** to the Commissioner of Social Security for further  
6 proceedings consistent with this decision and sentence four of 42 U.S.C. § 405(g).

7       The District Court Executive is directed to file this Order and provide copies to  
8 counsel. Judgment shall be entered for Plaintiff and the file shall be **CLOSED**.

9       **DATED** this 15th day of January, 2015.

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s/ Wm. Fremming Nielsen

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WM. FREMMING NIELSEN  
SENIOR UNITED STATES DISTRICT JUDGE